

Message Text

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ACTION INT-05

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CINCPACREP PASS SAIPAN FOR HICOM AND STATUS LNO
FOR HICOM AND STATUS LNO

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E.O. 11652: GDS

TAGS: EAID JA TQ

SUBJ: MICRONESIA CLAIMS AGREEMENT: MARICULTURE PROJECT CONTRACT

REF: TOKYO 5767 (010530Z APR 75)

SUMMARY: CLAIMS AGREEMENT AND RELATED NOTE EXCHANGE
STIPULATE THAT JAPANESE GRANT MAY BE USED ONLY FOR
PURCHASE OF JAPANESE PRODUCTS AND SERVICES. FONOFF
HAS CONFIRMED IN RESPONSE TO EARLIER EMBASSY INQUIRY
THAT THIS STIPULATION MUST BE STRICTLY ADHERED TO. IN
EMBASSY VIEW IT WOULD BE INAPPROPRIATE AND FUTILE TO
SUBMIT TO FONOFF FOR CONFIRMATION CONTRACT WHICH WAS
NOT IN CONFORMITY WITH THIS STIPULATION. EMBASSY
RECOMMENDS TTPI PREPARE MARICULTURE PROJECT CONTRACT
IN CORRECT FORM FOR SUBMISSION TO FONOFF ASAP. END SUMMARY.

1. EMBASSY IS AWARE FROM CONVERSATIONS WITH TTPI OFFICIALS
THAT DIFFERENCE OF OPINION EXISTS WITHIN TTPI AS TO
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PROPRIETY OF SUBMITTING MARICULTURE PROJECT CONTRACT
TO FONOFF FOR CONFIRMATION AS NOW WRITTEN (I.E.
WITHOUT SPECIFIC MENTION OF LOCAL COSTS AND THEIR
EXCLUSION FROM JAPANESE-FUNDED PORTION OF CONTRACT).

2. AS ADDRESSEES ARE AWARE, CLAIMS AGREEMENT ITSELF STIPULATES IN ARTICLE I THAT JAPANESE GRANT IS TO BE USED QTE FOR THE PURCHASE IN JAPAN BY THE ADMINISTERING AUTHORITY OF THE PRODUCTS OF JAPAN AND THEIR SERVICES OF THE JAPANESE PEOPLE UNQTE. IDENTICAL RESTRICTION IS MADE APPLICABLE TO INTEREST ON SPECIAL ACCOUNT BY PARA 2(3) OF THE EXCHANGE OF NOTES OF MARCH 13, 1973.

3. EVEN THOUGH MEANING OF THIS STIPULATION SEEMS CLEAR ENOUGH ON ITS FACE, EMBASSY AND/OR PROCUREMENT OFFICER HAVE DISCUSSED WITH FONOFF ON MORE THAN ONE OCCASION QUESTION WHETHER RESTRICTION COULD BE BROADLY INTERPRETED SO THAT ANY PRODUCT PROCURED OR SERVICE RENDERED BY JAPANESE CONTRACTOR IN COURSE OF EXECUTING PROCUREMENT CONTRACT WOULD FALL WITHIN IT, OR, ALTERNATIVELY, WHETHER EXEMPTION FROM RESTRICTION COULD BE ALLOWED FOR CERTAIN PERCENTAGE OF COST OF CONTRACT NEEDED FOR FOREIGN MADE COMPONENTS OR LOCAL COSTS ASSOCIATED WITH CONTRACT. MOST RECENT OCCASION ON WHICH QUESTION WAS DISCUSSED BY EMBASSY WITH FONOFF, IN RESPONSE TO A TTPI REQUEST THAT THIS QUESTION BE EXPLORED, WAS APRIL 28.

4. FONOFF'S CONSIDERED RESPONSE WAS REPORTED IN REFTEL PARA 3. IT READS QTE AS AGREEMENT CLEARLY STIPULATES YEN CONTRIBUTION IS FOR PRODUCTS AND SERVICES OF JAPANESE PEOPLE, CONTRIBUTION MAY NOT RPT NOT BE USED TO PAY FOR NON-JAPANESE PRODUCTS AND SERVICES WHICH MAY FORM A PART OF SOME PROJECT. HOWEVER, AGREEMENT WOULD PERMIT USE OF NON-JAPANESE PRODUCTS AND SERVICES IN A PROJECT SO LONG AS NON-JAPANESE PRODUCTS AND SERVICES WERE PAID FOR BY FUNDS OTHER THAN JAPANESE YEN CONTRIBUTION, AND SO LONG AS PROCUREMENT CONTRACT TO BE SUBMITTED FOR GOJ CONFIRMATION CLEARLY IDENTIFIED PRODUCTS AND SERVICES TO BE PAID FOR WITH JAPANESE CONTRIBUTION. END QTE. CONFIDENTIAL

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5. IN EMBASSY'S OPINION, THERE IS NO CHANCE THAT THE FONOFF WILL CONFIRM A CONTRACT WHICH OBVIOUSLY ENTAILS LOCAL COSTS BUT WHICH DOES NOT MENTION THEM; SUBMITTING CONTRACT FOR CONFIRMATION IN INCORRECT FORM WOULD ONLY CAUSE DELAY WHILE CONTRACT WAS REWRITTEN AND RESUBMITTED.

6. MOREOVER, SERIOUS QUESTION ARISES OF PROPRIETY OF TTPI SUBMITTING CONTRACT IN INCORRECT FORM IN HOPE FONOFF WOULD KNOWINGLY OR UNKNOWINGLY OVERLOOK ITS IRREGULARITIES AND CONFIRM IT. STIPULATIONS IN AGREEMENT AND NOTE EXCHANGE ARE CLEAR AND ARE INCORPORATED IN INTERGOVERNMENTAL AGREEMENTS WHICH BOTH SIDES ARE

BOUND TO EXECUTE IN GOOD FAITH.
AS RESULT OF OUR EARLIER INQUIRIES, MADE AT TTPI REQUEST,
RE POSSIBLE FLEXIBILITY IN INTERPRETING AGREEMENT, AND
FONOFF RESPONSE THERETO, WE ARE ON NOTICE OF PROBLEM
INVOLVED; WE CANNOT PLEAD INNOCENCE OR MISUNDERSTANDING.
IN EMBASSY VIEW, IT WOULD BE HIGHLY INAPPROPRIATE TO
SUBMIT TO FONOFF CONTRACT WHICH WE HAVE REASON TO
BELIEVE IS NOT IN KEEPING WITH LETTER OR SPIRIT OF AGREE-
MENT AND WHICH IS WORDED SO AS TO CIRCUMVENT THE PRO-
VISIONS OF THE AGREEMENT; TO DO SO WOULD BE INCONSISTENT
WITH RELATIONSHIP OF MUTUAL TRUST AND CONFIDENCE WHICH
EMBASSY HAS ENDEAVORED TO ESTABLISH WHEN DEALING WITH
FONOFF ON CLAIMS AGREEMENT MATTERS.

7. SINCE ABOVE PARAGRAPHS WERE DRAFTED, EMBASSY
HAS LEARNED THAT FONOFF HAS IN FACT REFUSED TO CONFIRM
MARICULTURE PROJECT CONTRACT IN PRESENT
,ORM. EMBASSY ASSUMES THAT ARGUMENT AS TO MANNER OF
PROCEEDING HENCEFORTH IS THUS RESOLVED, AND RECOMMENDS
THAT CONTRACT BE REWRITTEN IN CORRECT FORM (I.E.
WITH DETAILED ENUMERATION OF PRODUCTS AND SERVICES
INVOLVED CLEARLY INDICATING JAPANESE PRODUCTS AND
SERVICES TO BE PAID FOR BY JAPANESE GRANT AND NON-JAPANESE
PRODUCTS AND SERVICES TO BE PAID FOR OTHERWISE) AND
SUBMITTED TO FONOFF FOR CONFIRMATION AS SOON AS
POSSIBLE.

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